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No. 71-1252

# In the Supreme Court of the United States

OCTOBER TERM, 1971

VICTOR SAMUEL KAMBER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of willfully and knowingly being a party to the making of a false statement bearing upon his classification for service in the armed forces, in violation of 50 U.S.C. App. 462(a), and was sentenced to two years' imprisonment.[1] The court of appeals affirmed (Pet. App. 1a-6a).

Petitioner registered with his local board on August 15, 1961, and except for three brief intervals was deferred from service as a student (class II-S) or as

[1] Petitioner was found not guilty of the charge of willfully and knowingly making a false statement to his local board bearing upon his classification for service, in violation of 50 U.S.C. App. 462(a).



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a teacher (class II–A) until June 20, 1968, when he was classified I–A (SSF A–56).[2] Upon receipt of his notice of classification, petitioner advised his local board that he wished to appeal his I–A classification in that he was employed as a full-time associate professor at Prince George's Community College in Largo, Maryland (SSF A–33). Petitioner's file was then transmitted to the appeal board which voted unanimously (4–0) on September 10, 1968, to retain him in his I–A classification (SSF A–38). Petitioner then requested a courtesy interview with the local board to discuss his II–A deferment (SSF A–41), which was granted and scheduled for October 8, 1968 (SSF A–43). Prior to this interview, letters were received by the local board and the State Director of the Selective Service System, dated October 2, 1968, purportedly signed by Dr. J. G. Handley, Chairman of the Division of Humanities at Prince George's Community College, requesting reconsideration of petitioner's I–A classification (SSF A–47, 48). The letters were highly laudatory of petitioner stating that his departure would be a severe loss to both the college and the student body and further indicating that it would be extremely difficult to replace petitioner at that time (*ibid.*). Upon acknowledging receipt of the letter (SSF A–51), the State Director's office received a reply from Dr. Handley disavowing any knowledge of the October 2, 1968, letter. Dr. Handley further in-

[2] "SSF" refers to petitioner's Selective Service file introduced as Government Exhibit A in the district court.

[3] Petitioner subsequently notified his local board that he could not keep the appointment (SSF A–49).

dicated that, though petitioner had previously requested the president of the college to write the local board regarding his classification, the president had declined upon Dr. Handley's recommendation because petitioner's record at the college was far from exemplary and it would not be difficult to find a replacement for him (SSF A–52). Thereafter, an investigation was initiated and petitioner's indictment followed.

On the morning following the commencement of the trial, an article appeared in a local newspaper regarding petitioner's trial (Pet. App. 3a). The article paraphrased the essential allegations of the indictment and related that petitioner had held a position in the upper echelons of the Young Republicans and had remained in that position after his indictment (*ibid.*). The article also reported that on two occasions petitioner had, by virtue of his position, escorted President Nixon's daughters to political affairs in Washington (*ibid.*). The trial judge conducted a *voir dire* examination of each juror out of the presence of the others to determine whether the juror had read the article and, if so, whether the juror felt the article would prevent him from considering the case impartially (*ibid.*). Although eight of the jurors stated that they had read the article, and two of the remaining jurors had heard it discussed, none thought that the article had prejudiced them, and several stated that they did not learn anything new from the article (*ibid.*).

During the trial, Dr. Handley testified for the government that he neither prepared nor signed the October 2, 1968, letter submitted by petitioner to the local

board (Tr. 110).[4] Petitioner waived cross-examination of Dr. Handley (Pet. App. 6a). Also called by the prosecution was Special Agent Thomas Sullivan of the F.B.I., who had interviewed petitioner previously regarding the October 2, 1968, letter. Sullivan testified that petitioner had told him that he had requested Dr. Handley to write a letter to his local board regarding his classification, but that Dr. Handley had refused (Tr. 114). Sullivan testified that petitioner had related that he then prepared the October 2, 1968, letter himself and deposited it in Dr. Handley's mail box at the college thinking that once Dr. Handley saw the letter he would change his mind and sign it (Tr. 115). Petitioner had then, according to his account to Sullivan, gone to his own mail box and found the letters puportedly signed by Dr. Handley (Tr. 115), which he had notarized and mailed to his local board and the State Director.

1. Petitioner contends here, as he did below, that he was deprived of a fair trial in that the government presented false evidence to the jury through the testimony of Special Agent Sullivan to the effect that petitioner had asked Dr. Handley, prior to October 2, 1968, to write a letter to his local board regarding his classification. Petitioner seeks support for his contention in the fact that in an interview with the F.B.I. prior to trial, Dr. Handley had denied that petitioner had previously asked him to write a letter to the local board. Dr. Handley's statement, however, even if ac-

[4] "Tr." refers to the transcript of the proceedings in the district court contained in Appellant's Appendix filed in the court of appeals.

cepted as true, does not establish that Sullivan's testimony was false since Sullivan only testified as to what petitioner had told him. Moreover, petitioner was given a copy of both Dr. Handley's statement to the F.B.I. and Sullivan's report prior to the testimony of each at trial, yet petitioner waived cross-examination of Dr. Handley and did not refer to any inconsistency in his cross-examination of Sullivan. Although available, neither witness was recalled by petitioner to explore possible inconsistencies. Under the circumstances, petitioner's assertion that the government was under an obligation to call additional witnesses to bolster or rebut Special Agent Sullivan's testimony is without merit. See *United States* v. *Higginbotham*, 451 F. 2d 1283, 1285–1286 (C.A. 8); *Zammar* v. *United States*, 217 F. 2d 223, 226 (C.A. 8); *Miller* v. *United States*, 53 F. 2d 316, 317 (C.A. 7).

2. Petitioner also contends that the appearance of the newspaper article on the first full day of his trial deprived him of a fair and impartial trial. This contention is without merit. As observed by the court of appeals, "it [is] hard to believe that a petit jury would be prejudiced against a man on the basis of an article which said no more than what the instant piece did" (Pet. App. 4a–5a). Here, the article related little more than what was contained in the indictment (*cf. United States* v. *Cook*, 432 F. 2d 1093, 1105 (C.A. 7)), and each juror, when interrogated out of the hearing of the remaining jurors, affirmatively stated that the article had no prejudicial effect upon his ability to render an impartial decision in the case. Under such circumstances, petitioner was not deprived of due proc-

ess by prejudicial publicity. See *United States* v. *Hyde*, 448 F. 2d 815, 847–850 (C.A. 5); *United States* v. *Jannsen*, 339 F. 2d 916, 919–920 (C.A. 7).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

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